NO. 74363-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KARL PIERCE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL ASSIGNMENT OF ERROR

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The prosecutor committed flagrant and ill-intentioned misconduct in rebuttal argument by relying on ER 404(b) evidence, which was admitted for the limited purpose of consciousness of guilt, for the impermissible purpose of portraying Karl Pierce as violent or an otherwise bad person.

B. ARGUMENT IN REPLY

1. Pierce preserved for appeal the trial court's error in denying the requested excusable homicide instruction and it requires remand for a new trial.

Because the trial court erred when it failed to provide the defense-proposed excusable homicide instruction, to support the defense of accidental or mistaken homicide, the conviction must be reversed and the matter remanded for a new trial.

The State ignores critical portions of the record to misleadingly argue that Pierce has not preserved this error for appeal. Resp. Br. at 58-59. While it was Bienhoff who proposed the excusable homicide instruction, both defendants excepted to the court's failure to provide it. RP 2743-50, 3726-28. Pierce explicitly stated on the record that he joined Beinhoff's exception to the court's failure to provide an excusable homicide instruction. RP 3727-28.

> THE COURT: Okay. So, for purposes of exceptions, you [Mark Tackitt, counsel for Pierce] are also making the same exceptions with regard to failure to give justifiable and excusable homicide.
>
> MR. TACKITT: Yes, that is correct. . . . I did mean excusable [recognizing the request for a justifiable homicide instruction had been withdrawn].

RP 3727-28.

The issue is preserved for this Court's review.

The excusable homicide defense does not thwart the "very purpose of the felony murder doctrine" as the State claims. Resp. Br. at 60. Excusable homicide serves as a defense only if the death is not the result of the defendant's intentional action, that is, only where death results from accident or mistake. Felony murder still provides liability for intentional murders committed in the course of an enumerated felony.

The State's next argument likewise fails. In applying the excusable homicide defense, the jury indeed could have found that Bienhoff was "doing [a] lawful act by lawful means." RCW 9A.16.030; *see* Resp. Br. at 61. If Reed pulled out a gun, Bienhoff acted lawfully by reaching out to prevent Reed from using it. *State v. Slaughter*, 143 Wn. App. 936, 942, 186 P.3d 1084 (2008) (act of self-defense preceding accidental killing is a lawful act warranting excusable homicide instruction).

Moreover, the State's concession that "It is possible that excusable homicide would be available as a defense to felony murder based on assault" undermines its arguments that excusable homicide thwarts the purpose of the felony murder doctrine or does not comport with the language of RCW 9A.16.030. Resp. Br. at 62 n.18. If excusable homicide is an applicable defense to felony murder by assault without thwarting the purpose of the doctrine or falling short of the statutory language, then applying it to felony murder based on robbery would also not pose these invented problems. By the State's own terms, those arguments fail.

In an attempt to avoid *State v. Brightman*, the State reads too much into the opinion. Resp. Br. at 61 (responding to Pierce's argument that *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005) supports giving an excusable homicide instruction to the charge of felony murder). *Brightman* did not specify that the excusable homicide instruction it approved of could apply only to premediated murder on remand. *Accord In re Pers. Restraint of Caldellis*, 187 Wn.2d 127, 142, 385 P.3d 135 (2016) (quoting *Brightman* with approval for notion that accidental killing committed while acting in self-defense constitutes the defense of excusable homicide without limitation as to the type of homicide charged).

The State also does not explain how *Slaughter* does not control. Resp. Br. at 62. Perhaps this is part of the State's illogical argument that

excusable homicide is an applicable defense to felony murder based on assault but not if the felony is robbery. *See* Resp. Br. at 62 n.18. *Slaughter*, however, is directly on point. In that case, this Court held that an excusable homicide instruction (WPIC 15.01) was properly provided because, in response to a felony murder charge, Slaughter asserted the defense of accidental homicide in the course of self-defense. 143 Wn. App. at 945-47. "[W]here a defendant does something in self-defense that leads to an accidental homicide, the applicable defense is excusable . . . homicide." *Id*. at 942. This Court held in *Slaughter* that an excusable homicide is a lawful defense to felony murder. *Id*. at 945-47. The trial court here erred in denying Pierce that same instruction.

The State's attempt to explain away *State v. Harris* is similarly unavailing. Resp. Br. at 62-63 (responding to Pierce's citation of *State v. Harris*, 69 Wn.2d 928, 421 P.2d 662 (1966), *abrogated on other grounds as noted in State v. Leonard*, 183 Wn. App. 532, 334 P.3d 81 (2014)). The State does not explain how *Harris*'s repeated discussion that felony murder is subject to an excusable homicide defense would not control. 69 Wn.2d at 932-33.

Finally, the State improbably argues that Pierce was not prejudiced by the denial of an excusable homicide instruction because he did not argue excusable homicide in his summation. Resp. Br. at 58-59 & n.16,

63-64. Once the court denied the excusable homicide instruction, the defendants could not be found innocent by arguing Reed's death was unintentional. Therefore, although the evidence supported it, that argument was not made and Pierce pursued other theories in his defense. However, Pierce was prejudiced by the denial of the excusable homicide defense because he asked for the opportunity to make that argument, he was entitled to raise that defense, and the facts supported it. *State v. Theroff*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980) (defendant entitled to an instruction on any theory supported by the evidence or lack of evidence); *State v. Griffin*, 100 Wn.2d 417, 419-20, 670 P.2d 265 (1983) (reversible error where the jury may have been presented with evidence to support a diminished capacity defense but was not instructed on that defense). Moreover, Bienhoff made the argument in his opening statement that Reed's death was the accidental result of a struggle to obtain the firearm Reed pulled on Bienhoff. RP 1116, 1122; *see* RP 3812 (Pierce notes Bienhoff is the only one who actually knows what happened in the van). If Bienhoff was innocent of felony murder as a principal, Pierce was also innocent of that same act as an accomplice; yet, the jury was provided no instruction supporting acquittal on this basis. The error requires reversal.

2. The judge's statement contrasting a 'white guy like me' to 'somebody who is actually, you know, more likely to be a gangster' violated Pierce's due process right to the appearance of fairness and impartiality.

Criminal defendants have a due process right to a fair trial by an impartial judge. U.S. Const. amends. VI, XIV; Const. art. I, § 22. "Impartial" means the absence of bias, either actual or apparent. *State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). Therefore, due process guarantees a fair trial free from the appearance of bias or partiality. *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955); *State v. Madry*, 8 Wn. App. 61, 68-69, 504 P.2d 1156 (1972).[1] "Justice must

[1] The constitutional due process challenge raised here is distinct from the "appearance of fairness doctrine" which is related to due process concerns but is not based in the constitution. *City of Bellevue v. King County Boundary Review Bd.*, 90 Wn.2d 856, 863, 586 P.2d 470 (1978) ("Our appearance of fairness doctrine, though related to concerns dealing with due process considerations, is not constitutionally based."). Mr. Pierce has not assigned error under the non-constitutional "appearance of fairness doctrine"; the issue raised implicates the constitutional due process right to a fair trial by an impartial judge. *See* Op. Br. at 1 (assignment of error 2), 4 (issue 2). The State appears to be confused about this distinction in its response brief. *See* Resp. Br. at 56 ("Pierce cites to no authority that the appearance of fairness doctrine is a requirement of due process."). This constitutional issue can be raised for the first time on appeal because it is of constitutional magnitude and the error is apparent at the time it occurred. RAP 2.5(a)(3); *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). Moreover, as quasi-judicial officers, the prosecutors were in at least as good a position as Pierce to object to this appearance of partiality but failed to do so. *See, e.g.*, *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935) (prosecutor is a representative of a sovereignty obliged to govern impartiality and ensure that justice is done); *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (recognizing prosecutor is "the representative of the people in a quasijudicial capacity in a search for justice" owing a duty to ensure constitutionally fair trials); *State v. Torres*, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976) (discussing prosecutor's duty to serve the causes of justice and fairness).

satisfy the appearance of justice." *Id*. (quoting *Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11 (1954)).

The rule is "stringent." *Murchison*, 349 U.S. at 136. An accused person is denied due process of the law whenever the "average man as a judge" has "a possible temptation . . . not to hold the balance nice, clear, and true between the State and the accused." *Id.* The effect on the judicial system can be debilitating when "a trial judge's decisions are tainted by even a mere suspicion of partiality." *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995). The effect on the administration of justice is "especially pernicious" when the appearance of impartiality derives from a sense of racial injustice. *Pena-Rodriguez v. Colorado*, __ U.S. __, 137 S. Ct. 855, 868, 197 L. Ed. 2d 107 (2017) (quoting *Rose v. Mitchell*, 443 U.S. 545, 555, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979)). Racial bias is "a familiar and recurring evil that . . . risk[s] systemic injury to the administration of justice." *Id*.

A reasonable observer would question the appearance of impartiality here after the trial judge stated, while ruling on the admissibility of evidence, that the transmitter of the text message in question might be "some white guy like me making a threat or somebody's who's actually, you know, more likely to be a gangster." RP 2915. Judge North's comments could reasonably be interpreted to mean

either that nonwhites are more likely to "actually, you know . . . be a gangster" than are "white guy[s] like me[,]"or, Judge North's comments could reasonably be interpreted as the State advocates, which is to indicate that, in light of Judge North's "white guy . . . appearance and age he would not be seen as particularly threatening or intimidating." Resp. Br. at 57 (State argues for latter interpretation); *see Sherman*, 128 Wn.2d at 206 (appearance of impartiality is judged from an objective perspective). Both are reasonable interpretations. And both interpretations would reasonably lead an objective observer to think Judge North, or the system, appears to view "white guys" differently from others. *See Buck v. Davis*, __ U.S. __, 137 S. Ct. 759, 776, 197 L. Ed. 2d 1 (2017) (noting the powerful racial stereotype—"a particularly noxious strain of racial prejudice"—that black men are violence prone). Even if that is the appearance but not, in fact, true.

Inserting the specter of racial bias into the criminal justice system "'poisons public confidence in the judicial process'" and "injures not just the defendant, but the 'the law as an institution, . . . the community at large, and . . . the democratic ideal reflected in the processes of our courts.'" *Buck*, 137 S. Ct. at 778 (quoting *Davis v. Ayala*, 576 U.S. __, 135 S. Ct. 2187, 2208, 192 L. Ed. 2d 323 (2015); *Rose*, 443 U.S. at 556) (alteration in original)).

The State's argument that the appearance of partiality did not prejudice Pierce is off-point and incorrect. First, judicial partiality is structural error. *Chapman v. California*, 386 U.S. 18, 23 & n. 8, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Pierce need not demonstrate tangible prejudice. Second, the court excluded the evidence it was reviewing while it made this apparently biased statement. RP 2969-71 (excluding evidence that Charisma threatened Reed physically if financial debt owed was not paid). Thus, Pierce was clearly prejudiced by the court's apparent viewpoint that it needed to know the color of the utterer's skin before it could determine the seriousness of the threat communicated. The court also denied Mr. Pierce's equal protection *Batson*[2] challenge to the State's strike of the only black juror in the box. RP 854-55, 1015-20. A judge who appears to distinguish among people on the basis of the skin color would appear poorly equipped to fairly assess an equal protection challenge. Pierce has independently challenged the court's denial of his *Batson* challenge. Op. Br. Section 4.f. and Section 4, *infra*.

Even perceived "racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered . . . to prevent a systemic loss of confidence in jury verdicts,"

[2] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

which "confidence is a central premise of the Sixth Amendment" right to a fair trial. *Pena-Rodriguez*, 137 S. Ct. at 869.

3. Evidentiary rulings erroneously admitted irrelevant and prejudicial evidence against Pierce and improperly precluded Pierce from presenting evidence probative of his defense.

The trial court's evidentiary rulings improperly allowed the jury to consider irrelevant and prejudicial evidence against Pierce and hamstrung his defense.

a. The jury should not have heard irrelevant and unfairly prejudicial evidence of Pierce's violence towards a co-defendant 10 months after Reed's death.

The trial court abused its discretion in admitting under ER 404(b) evidence of Pierce's violence towards a third party—an in-custody assault of a codefendant—months after the alleged murder to show consciousness of guilt. Op. Br. at 24-29. The probative value was limited but the risk of unfair prejudice was high because the uncharged misconduct, like the charged felony murder, was a violent act that increased the chance the jury would make a forbidden propensity inference. This risk became a certainty when the prosecutor argued in rebuttal that the assault evidence showed Pierce's propensity for violence.

In response, the State relies on *State v. Price*, 126 Wn. App. 617, 644-45, 109 P.3d 27 (2005). Resp. Br. at 37. In that case, the trial court

admitted evidence that the defendant had "a backpack full of grooming supplies, medications, and hair trimmers" to support "a reasonable inference" that the defendant "left the state to avoid arrest and prosecution." 126 Wn. App. at 645. The evidence admitted was not prejudicial beyond the extent to which it was relevant of intent to flee.

Tellingly, unlike here, the evidence in *Price* was not admitted under ER 404(b) because it was not character evidence or evidence of other crimes, wrongs or acts. *Id*. at 644-45. Standing alone, the grooming supplies, medications and hair trimmers were innocuous items. Thus, the defendant apparently challenged only the relevance of the evidence, and the Court of Appeals upheld the trial court's ruling that the evidence was relevant. *Id*.

On the other hand, the assault admitted here carried extraordinary prejudice entirely detached from any relevance to consciousness of guilt. Upon the court's ruling here, the State presented testimony from Barnes and two guards from the King County Courthouse where the assault occurred that there were loud knocking noises from the holding tank, Pierce was found standing over Barnes telling him to stay on the ground, Barnes needed eight stitches below his left eye, was subsequently concerned for his safety, and was taken to solitary confinement for his own protection. RP 2157-64, 2238, 2336-38, 2392-2414. The prosecutor

highlighted the violent nature of the evidence, telling the jury in summation that

> [Pierce] bragged about knocking out Scott Barnes, his codefendant, causing Barnes to be wheeled out in a wheelchair, causing him to need eight stitches, causing Pierce to break his own hand.

RP 3776.

In *State v. Chase*, 59 Wn. App. 501, 507-08, 799 P.2d 272 (1990), on which the State also relies, the Court of Appeals affirmed the admission of evidence the defendants provided false names when they were contacted by the police. The defendants were ultimately convicted of second degree burglary. *Chase*, 59 Wn. App. at 502. The Court of Appeals found the evidentiary challenge waived as to one of the defendants, because there had been no objection to evidence that he provided a false name. *Id*. at 508. The Court further held the evidence was both probative and prejudicial and did not disturb the trial court's balancing of those factors. *Id*. at 507-08.

But again in *Chase*, unlike here, providing a false name carries less prejudice than evidence of an uncharged, subsequent violent assault does in a trial for a violent crime like murder. *See State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009) (ruling admitting 404(b) evidence of physical abuse to explain delay in reporting "made sense given

[defendant] was not on trial for or charged with physical abuse" (emphasis added)). Moreover, the prosecutor in *Chase* apparently did not call attention to the prejudicial value of the evidence as the prosecutor did here.

As in *Price* and *Chase*, *State v. Moran*, *State v. Saenz*, and *State v. McGhee* involved the admission of unrelated other conduct—witness intimidation. Therefore, the forbidden propensity inference at issue here (once violent, always violent) was not at stake in those cases. Resp. Br. at 38 (discussing *State v. Moran*, 119 Wn. App. 197, 81 P.3d 122 (2003) and *State v. Saenz*, 156 Wn. App. 866, 871, 234 P.3d 336 (2010), *aff'd in part on other grounds and reversed in part on other grounds*, 175 Wn.2d 167 (2012)). In fact, this Court held in *State v. McGhee*, 57 Wn. App. 457, 788 P.2d 603 (1990), that the witness intimidation evidence did not tend to show the defendant "was acting in conformity with a violent disposition" because the evidence was of name-calling and gestures, not of physical contact and because the defendant was charged with planning (not active participation in) the crimes. 57 Wn. App. at 461-62. Therefore, the undue prejudice was minimized in *McGhee*. *Id*. at 62. The same is not true here.

This is not a minor point of distinction among cases. It directly affects the weight of the undue prejudice integral to a proper ER 404(b) analysis.

Also in *Price*, *Chase*, *Moran*, *Saenz*, and *McGhee*, the prosecutor did not draw out the improper, unduly prejudicial value of the evidence as occurred here. *See Moran*, 119 Wn. App. at 218 (no discussion of prosecution drawing on impermissible basis at trial); *Saenz*, 156 Wn. App. at 871 (same). The resulting prejudice from the trial court's ER 404(b) ruling is, therefore, more damaging here. In addition, the prosecutor's argument—using ER 404(b) evidence for prohibited inferences to try to portray Karl Pierce as a violent actor—was flagrant and ill-intentioned misconduct that prejudiced Mr. Pierce. *Fisher*, 165 Wn.2d at 746-49 (reversing for flagrant and ill-intentioned misconduct where prosecutor relied on evidence admitted pursuant to ER 404(b) for prohibited purpose in argument and during presentation of evidence).

The State argues that admission of the evidence was not prejudicial by incorrectly claiming that "Pierce testified that he had previously assaulted Barnes." Resp. Br. at 38-39. Pierce did not say he previously assaulted Barnes, he testified that Barnes was openly using drugs at a barbecue at Ray Lyons's house, which upset Pierce particularly because drug use would jeopardize Lyons's public assistance, "section eight" housing so he "had an altercation with him, and I ended up taking his drugs." RP 3224-25. An altercation is not an assault; an altercation is a

verbal, not a physical dispute.[3] Contrary to the State's argument, the evidence of a physical assault on Barnes was not cumulative and was prejudicial.

Finally, to the extent the question of admissibility was a close one, it must be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P3.d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

b. The trial court improperly excluded evidence of Reed's lack of income, his extensive debts, and a threat of physical harm if a personal debt was not paid; this evidence was probative of Reed's motive and plan to rob Bienhoff**.**

The State admits that courts properly admit evidence of lack of income and extensive debts as probative of an individual's motive to commit robbery. Resp. Br. at 41 (discussing *State v. Matthews*, 75 Wn. App. 278, 877 P.2d 252 (1994); *State v. Kim*, 153 N.H. 322, 897 A.2d 968 (N.H. 2006)). But the State ignores both the nature of the evidence

[3] "Altercation," Merriam-Webster, https://www.merriam-webster.com/dictionary/altercation ("a noisy, heated, angry dispute" as with one's boss or a "noisy controversy") (last viewed Jul. 18, 2017); "Altercation," dictionary.com ("a heated or angry dispute; noisy argument or controversy") (last viewed Jul. 18, 2017).

excluded here and the trial court's reliance on an impermissibly high standard to exclude the evidence.

The trial court abused its discretion by excluding six pawn shop receipts that were coming due, evidence of Reed's receipt of financial assistance, a threat from Charisma to enforce a $300 debt Reed owed, that the Reeds received public assistance and had high expenses, as well as Reed's prior robbery, all of which related to Reed's motive and plan to rob Bienhoff. RP (10/26/15 PM) 63-67, 101-08; RP 2969-71; CP 336-38 (excluded pawn receipts totaled $1510). The State ignores the exclusion of some of this evidence in its analysis, thereby seeking to lessen the error and its effect. Resp. Br. at 40 (not discussing exclusion of evidence of Charisma's physical threat for nonpayment, six pawn receipts, receipt of public assistance or prior robbery).

The trial court required the defense to prove Reed was in "acute financial distress" or "financial crisis" before evidence of his financial motive to rob could be admitted. RP 104-38. But as the State implicitly recognizes, that is not the standard. *See* Resp. Br. at 41 (discussing cases admitting evidence of lack of income and debts to show motive to rob); *Matthews*, 75 Wn. App. at 284, 287-88 (citing additional cases where evidence of living beyond one's means or financial desperation was properly admitted and upheld).

In *Matthews*, this Court held that evidence of a defendant's bankruptcy and the correspondence of key bankruptcy-related events to the charged robberies was admissible to support the State's theory that an interrupted robbery was the motivation for the charged murder. 75 Wn. App. 278. The holding and reasoning of *Matthews* has been upheld in subsequent cases without any mention of a need to show "acute financial distress," the standard the trial court imposed here. Instead, in *State v. Kennard*, this Court held that "Evidence concerning a defendant's bankruptcy and poor financial condition is admissible to show that the defendant was living beyond his means." *State v. Kennard*, 101 Wn. App. 533, 541-43, 6 P.3d 38 (2000) (upholding admission of evidence to show events in bankruptcy proceedings indicating a need for financial resources corresponded with charged robberies). Likewise, in *State v. Luvene*, our Supreme Court approved of *Matthews* in upholding the trial court's admission of evidence that the defendant was financially distressed prior to the robbery and then suddenly accumulated wealth. 127 Wn.2d 690, 708-09, 903 P.2d 960 (1995).

The court abused its discretion by applying the wrong standard to exclude the proffered evidence of Reed's financial circumstances. *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 6-7, 330 P.3d 168 (2014)

(application of the wrong legal standard constitutes an abuse of trial court's discretion).

The excluded evidence is tied directly to the main issue in the case—did Reed intend to rob Bienhoff. RP 3871 (prosecutor's argument that critical question is whether the defendants intended to rob Reed or whether Reed intended to rob Bienhoff). "Living beyond one's means could reasonably provide a motive for robbery, which in turn could reasonably provide a motive for murder of the robbery victim." *Matthews*, 75 Wn. App. at 284. Although the State argues in its response brief that this evidence was minimally relevant, it was clear at trial that "the fundamental question here is: Who is the victim, and who is the robber?" RP 3871. As this Court noted in *Matthews*, "The human mind searches for a rational explanation for an irrational act." 75 Wn. App. at 284. The trial court prevented the defense from providing this explanation to the jury by applying an invented standard that was impermissibly high.

c. <u>The court abused its discretion in excluding evidence of Reed's prior robbery to show motive, intent and a plan to rob Bienhoff.</u>

Not only was Reed in financial distress, but Reed had previously robbed an acquaintance at gunpoint. CP 339, 426-28. But the trial court abused its discretion by excluding evidence of Reed's prior robbery when

it was probative of Pierce's defense that it was Reed who was trying to rob Bienhoff, and not the other way around.

Reed's prior robbery charge was dismissed only because the State could not locate the complaining witness, Reed's acquaintance Tony Sweet. CP 428. But, the probable cause statement demonstrates Reed was charged after Sweet reported Reed's vehicle approached Sweet and Reed exited, pulled a small black handgun out of his pocket and held it against Sweet's chest while Reed demanded Sweet give Reed everything Sweet had and Reed patted down Sweet's pockets. CP 427. Reed returned to his vehicle and drove away after taking $150 and a pack of cigarettes. *Id*. An unrelated bystander confirmed Sweet's report and provided him with the license plate number of the vehicle in which Reed pulled away. *Id*. A police check confirmed the vehicle was registered to Reed. *Id*. The detective who responded to the 911 call was subpoenaed to testify concerning the robbery charge against Reed. CP 426; RP 256-58.

This evidence established the prior robbery charge by a preponderance of the evidence, and the trial court did not deny the motion on that basis. RP 258-59.

The State mistakenly claims there is no attempt to explain how the robbery charge is admissible under ER 404(b). Resp. Br. at 44. Pierce was clear at trial that the charge is admissible to show Reed's intent and

plan to rob Bienhoff on February 20. *E.g.*, RP 234, 243, 244-45, 255-56; CP 424; CP 339-40, 345-47. Intent and plan are legitimate bases for admitting evidence under ER 404(b). *See State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995).

Where it is the defendant who moves to admit evidence under ER 404(b), there is no risk of undue prejudice to the defense. Therefore, "ER 403 does not extend to the exclusion of crucial evidence relevant to the central contention of a valid defense." *State v. Young*, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987); *accord United States v. Aboumoussallem*, 726 F.2d 906, 911-12 (2d Cir. 1984) ("we believe the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword"). The trial court found that the only prejudice it could consider in its ER 403 analysis was "to the truth-finding process." RP (12/1/15) 5-6; RP 235-36.

The trial court abused its discretion when it precluded Pierce from admitting evidence of Reed's prior robbery charge to support Reed's motive and plan to rob Bienhoff.

d. <u>The trial court further hampered the defense by excluding evidence of Demetrius Bibb's gun ownership.</u>

The trial court also excluded evidence that Reed's associate, Bibb, owned firearms and had knowledge, training and experience with the .45

caliber weapon used on February 20. RP 1606-09. This evidence was relevant to support the defense theory that Bibb, not Pierce, was the second shooter at the park on February 20.

The defendants sought to admit this evidence as relevant, as specific instances of conduct used to attack Bibb's credibility that he did not have a firearm on February 20 (ER 608(b)), and to prove Bibb's opportunity to be the second shooter that day (ER 404(b)). RP 1585-1609; CP 31, 100-01, 638-46. The State responds simply that the evidence was not admissible under ER 404(b) because there is not a sufficient nexus connecting the previously owned firearms to the one fired on February 20. Resp. Br. at 46-48. Yet, Bibb's knowledge, training, and experience as well as his opportunity to be the second shooter were relevant, non-propensity purposes for admitting the evidence.

The State also claims that the exclusion of the evidence was harmless. Resp. Br. at 48-49. However, the evidence tending to show Bibb was also armed on February 20 was actually more critical because there was evidence admitted that Pierce and Bienhoff had weapons. For the defense's argument that Bibb was the African-American shooter on February 20 to carry weight with the jury, the defense had to be able to show that Bibb was likely to have had a gun in his possession that day. The trial court's ruling denied Pierce that opportunity.

e. Pierce was further prejudiced by the admission of extensive substantive testimony of two out-of-court conversations where the only purpose for which they were admitted was to impeach testimony that the conversations did not occur.

Over objection, the trial court admitted testimony from Hiram Warrington that he had two conversations with Lyons that Lyons testified did not occur. RP 2659-60, 2696-2708. The testimony was purportedly admitted solely to impeach Lyons's testimony that the conversations did not take place. RP 2783. However, the State's examination of Warrington was not limited to asking him whether he had a conversation with Lyons or was present for a conversation between Pierce and Lyons. Instead, the State extensively examined Warrington as to the substance and content of those two conversations. RP 2780-92. The State did not proffer any basis for admitting the substance of the hearsay statements, and the jury was told not to consider it. However, it is well known that juries have a difficult time distinguishing between impeachment and substantive evidence. *State v. Hancock*, 109 Wn.2d 760, 763-64, 748 P.2d 611 (1988); RP 2719 (defense argument that jury is "going to take it in as substantive evidence").

Even the State seems to confuse the distinction in its response. The State argued first that some of the evidence, Lyons's purported statements to Warrington, was admissible under ER 613 to impeach

Lyons's credibility. Resp. Br. at 52. But that is exactly Pierce's point. The fact of the conversation is all that should have been admitted to impugn Lyons's credibility, where Lyons testified the conversation did not occur.

The State next argues that the remaining statements would have been admissible as substantive evidence as statements of a party opponent (Pierce's purported statements to Lyons in front of Warrington) or statements of a co-conspirator (Lyons's purported statements to Pierce about disposal of evidence allegedly uttered in front of Warrington). Resp. Br. at 51. But the State did not seek to admit these statements substantively. In fact, the jury was instructed not to consider them for their substance. RP 2783.

> THE COURT: And, ladies and gentlemen, some of this evidence here, evidence that Mr. Warrington's testified to is being admitted by the Court for a limited purpose.
>
> Testimony regarding any oral assertions made by Ray Lyons to Hiram Warrington may be considered by you only for the purpose of impeaching Ray Lyons' credibility. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Id. The State was involved in the process of crafting this limiting instruction and still did not argue that Warrington's eventual testimony was substantively admissible. RP 2713-25 (discussing instruction); CP

115-16 (proposed instruction); *see* RP 2716-17 (arguing hypothetical testimony, to which Warrington did not ultimately testify, would be substantively admissible under the state of mind exception to the hearsay rule, not at issue on appeal). The limiting instruction became the law of the case. *State v. Johnson*, No. 93453-3, Slip Op. at 2-3, 12-13 (Jul. 13, 2017) (unchallenged instructions become the law of the case—that is, the properly applicable law for purposes of appeal), 15 (law of the case doctrine encourages counsel to ensure propriety of instructions before given to the jury, promotes finality and efficiency, and encourages general notions of fairness). The State cannot now argue on appeal that the evidence was substantively admissible when it was not in fact admitted for that purpose and was only admitted as impeachment. If Pierce had been aware that the testimony was, in fact, admissible as substantive evidence, his objections during the prosecution's direct examination, cross-examination and closing argument would have been different. *See, e.g.*, RP 2794-2868 (defense cross-examination focuses on context and fact of conversations, not substance, and on unrelated topics); RP 2716-17 (prosecutor argues his closing argument would be affected if court admitted any testimony substantively).

4. The tainted jury selection requires remand for a new trial.

In his opening brief, Pierce presented five independent issues that arose during voir dire and require remand for a new trial: (1) the prosecutor committed misconduct when he initiated a discussion about the death penalty in this noncapital case where jurors could not be told whether the death penalty had been charged, (2) the court violated the rule established in *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001), by telling jurors that the death penalty was not at issue, (3) the *Townsend* rule is incorrect and harmful, (4) the trial court failed to instruct the panel that jurors could not share their understanding of the law where one juror asked if he could share his knowledge of the death penalty process with the other jurors, and (5) allowing the State to strike an African-American juror violated the Equal Protection Clause either under *Batson* or a new rule the Court should adopt. Op. Br. at 39-65.

Pierce relies primarily on the arguments set forth in his opening brief, but replies briefly in this section to the State's responses to these arguments.

a. The prosecutor committed misconduct by inviting the jury to consider what the punishment might be in this first degree murder case.

The State claims Pierce did not timely object below to the prosecutor's improper questioning, apparently designed to draw out jurors who were concerned with the death penalty or at least made to feel uncertain about whether it might be imposed. Resp. Br. at 14. But Pierce does not raise the issue for the first time on appeal, the defense objected below during the State's questioning as well as outside the presence of the prospective jurors and moved for a mistrial. RP 833-34 (defense objects to line of questioning but court allows State to continue inquiry), 839-71 (for example: "I have a very, very strenuous objection to the proceeding that we have and I'm afraid I have to ask for a mistrial."; arguing Supreme Court opinion does not allow State to "death-qualify a jury on a non-death penalty case"; Pierce joins objection and motion for mistrial). Moreover, misconduct during voir dire, like any misconduct, can be raised for the first time on appeal. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). Thus, if the Court finds Pierce did not raise the issue at trial despite his objections and motion for a mistrial, the court still reviews the misconduct and must determine whether it was flagrant and ill-intentioned. *Id*. By pressing the jury until a response concerning the death penalty finally arose, the prosecutor's questioning was flagrant and

ill-intentioned. The misconduct is also flagrant and ill-intentioned because it followed the State's discussion with the court about how the *Townsend* rule would be applied during voir dire, yet despite court's ruling the prosecutor led the jury to question the application of the death penalty. RP 406-08; *State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (misconduct flagrant and ill-intentioned when committed despite established rule).

The State argues that it was allowed to circumvent the *Townsend* rule and to death qualify the jury because Bienhoff moved to admit evidence that he was facing his third strike and life imprisonment. Resp. Br. at 14, 15. But the trial court denied Bienhoff's motion before voir dire commenced. RP 274 (denying motion, relying on *State v. Magers*, 164 Wn.2d 174, 189-90, 189 P.3d 126 (2008)). Bienhoff was held to the established rules and the State should have been as well.

In an attempt to justify the misconduct, the State ignores key portions of the prosecutor's questioning. For example, Juror 1 did not ask about the death penalty in response to the prosecutor asking "the jurors if they were 'okay' with them having 'nothing whatsoever to do with punishment.'" Resp. Br. at 16. Juror 1's question about the death penalty was posed only after the prosecutor continued to ask about punishment, reminded the jury that the charge was first degree murder, and moved

around the room looking for the answer he was seeking. RP 824-25. Here is a complete excerpt of that initial exchange:

> The judge will instruct you that you have nothing whatsoever to do with punishment or what occurs after that finding. Does that make sense? Do you guys all understand that? **Everyone is nodding their head**.
>
> Are you okay with it [having nothing to do with punishment]? **Everybody in the jury box seems to be nodding their head**. Anybody have a concern about that or think that doesn't make sense? **Anybody? No one?**
>
> **What about over here? Everyone okay with that?** Does that cause you any concern about being a juror **in this case where the charge is murder in the first degree**? **Anybody?**
>
> A. (Juror Number 1) Is there a death sentence thing in the state of Washington? That might bother me.

RP 824-25 (emphasis added). The prosecutor could have stopped after his first question—whether everyone was okay with an instruction that they would have nothing whatsoever to do with punishment, to which everyone nodded. If he was truly trying to ensure that the jurors could follow the court's instruction, the inquiry would have ceased there. Instead, the prosecutor continued until Juror 1 inquired about the death penalty. RP 824-25.

The State tries to recast Pierce's issue as limited to the prosecutor "asking the prospective jurors about their ability to follow the court's instructions regarding consideration of punishment." Resp. Br. at 17-18.

But the above example shows the prosecutor took the matter much further, pressing the panel until the issue of the death penalty was raised, continuing the discussion at length, eliciting responses that did not affect juror qualifications in this noncapital case, and making comments like "our wise Washington Supreme Court has said that the judge cannot tell you whether or not this is a death penalty case or whether or not that is a potential outcome." *See* RP 825-33. The trial court agreed that the information was irrelevant and the jurors' views on the death penalty should not be elicited. RP 838-41, 851.

b. The trial court violated the *Townsend* rule by informing the jury that this is a noncapital case.

Among the many comments the court made about punishment during voir dire, it informed the jury that "it's the court's job to do sentencing." RP 836-37. This remark broadcast to the jury that the death penalty was not at issue here, in contravention of *Townsend*, which held it is error to tell jurors the death penalty is not involved in a first degree murder case where the State is not seeking the death penalty. *See* RP 825-26 ("The Washington Supreme Court has said that I can't tell you whether a death sentence is involved or not."); RP 835-36 (court informs the jurors that they will not be involved in the sentencing process in this case); RP 835 ("Your job is to decide guilty or not guilty."). The State's response

ignores this statement that the court would decide punishment (although it was set forth in Pierce's opening brief) to argue the jurors "were told that they could not be informed whether it was a death penalty case, and that any proceeding involving punishment would involve another jury." Resp. Br. at 22. The State is wrong, the court told the jury that the court itself would impose punishment in this case. RP 836-37 ("it's the court's job to do the sentencing"). Any juror familiar with Washington's capital punishment scheme, of which there was at least one, knew this was a noncapital case. RP 830 (juror asks if prior knowledge regarding death penalty process could be shared with others).

The court violated *Townsend*.

The error was prejudicial. First, as set forth above, jurors who were actually qualified to sit on this noncapital case were disqualified because of their response to learning that the death penalty might be imposed (which it could not have been) or that they would not know whether the death penalty could be imposed in this case. These jurors were also more likely to be defense friendly. Op. Br. at 46-48, 55.

Second, there is a reasonable probability that knowing the death penalty was not a punishment option made it easier for the jury to convict. *Townsend*, 142 Wn.2d at 847. "[I]f jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in

their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility." *Id*. These were all reasonable probabilities in Pierce's trial. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 693-94, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

c. Alternatively, the *Townsend* rule should be replaced with a rule allowing the venire to be told that the death penalty is not at issue.

The State agrees that the *Townsend* rule is incorrect and harmful. Resp. Br. at 23-24. It should be overruled, and Pierce should be retried under the new rule.

d. When the issue arose, the trial court erred by failing to instruct the jury panel that jurors cannot consider or share their understanding of the law, rather they must apply the instructions provided by the court.

The State does not respond to Pierce's briefing on the trial court's failure to instruct jurors that they could not rely on their prior knowledge of the law when Juror 20 asked whether jurors who know could tell others how the death penalty works in Washington. Op. Br. at 53-55. Rather than instruct the jurors that it must follow the court's instructions and that it cannot rely on prior knowledge or outside sources, the court stated it did not know how to respond. RP 830 ("I don't know how to answer that

question, because the Washington Supreme Court's decision I find very difficult, so I can't – I don't know what to say about that."). The Court should treat the State's failure to respond as a concession on this issue. *State v. Ward*, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005).

e. By allowing the State to strike an African-American juror for pretextual reasons, the trial court violated Pierce's right to equal protection.

The trial court overruled Pierce's objection to the State's strike of an African-American juror, in violation of the Equal Protection Clause either under *Batson* or a new rule the Court should adopt. Since the filing of opening and response briefs, our Supreme Court decided *City of Seattle v. Erickson*, __ Wn.2d __, 2017 WL 2876250 (Jul. 6, 2017). *Erickson* adopted the bright-line rule that the State asserts did not exist under prior Washington case law. *Compare* Resp. Br. at 29 *with Erickson*, 2017 WL 2876250, at *4-6. Moreover, in reply to the State's argument that Pierce does not set forth a prima facie case of purposeful discrimination under the first step of *Batson*, *Erickson* notes "*Batson* is concerned with whether a juror was struck because of his or her race, not the level of diversity remaining on the jury." 2017 WL 2876250, at *6; Resp. Br. at 29. And,

as the State concedes, the first-step of the *Batson* test is moot because the second and third steps were undertaken below. Resp. Br. at 29-30.

The State apparently misunderstands the constitutional protections afforded by the Equal Protection Clause by noting that Pierce is Caucasian and not the same race as the struck black juror. Resp. Br. at 29 n.1, 32. The *Batson* rule "is designed to remedy the harm done to the dignity of persons and to the integrity of the courts." *Georgia v. McCollum*, 505 U.S. 42, 48, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (internal quotations and citation omitted). The race of the defendant is irrelevant to whether racial discrimination caused the striking of an African-American juror. *Powers v. Ohio*, 499 U.S. 400, 111 S .Ct. 1364, 113 L. Ed. 2d 411 (1991) (holding "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same races").

In trying to justify its actions below, the State fails to mention that juror 6 stated "I think that my views can be fair, and I think that they can be impartial. . . . I feel that I am capable of making a fair and impartial decision." RP 878; *see* RP 580-88 (at State's urging, court denies defense motion for cause on juror 77 who expressed extreme nervousness about evidence of anything violent but also stated she could be fair and impartial). Notably, this assurance that juror 6 was qualified to serve

followed those that the State recites. *See* Resp. Br. at 27-28 (reciting earlier statements from juror 6). The State again ignores juror 6's assurance that she could be fair and impartial in analyzing the third *Batson* step—whether purposeful discrimination occurred. Resp. Br. at 30. But the State's failure to consider these assurances from juror 6 suggests its justification is pretext. *Snyder v. Louisiana*, 552 U.S. 472, 485, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008). And this Court cannot selectively read the record, as the State does, in employing the thorough inquiry required to decide whether the prosecution's race-neutral explanation for the peremptory challenge should be believed. *Batson*, 476 U.S. at 93; *Ali v. Hickman*, 584 F.3d 1174, 1180 (9th Cir. 2009).

The State can apparently justify its strike of juror 6 only by arguing hypothetical changes in the case could have made it difficult for her to render a verdict. Resp. Br. at 30-31 (arguing court might have revised ruling excluding Bienhoff's possible life sentence or Bienhoff might have violated the ruling if he testified). The State cites no case that supports its contention that unlikely hypothetical changes in the court's pretrial rulings constitute race-neutral reasons for striking a minority juror. In fact, this is the sort of explanation unworthy of credence that is "quite persuasive" circumstantial evidence probative of intentional discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 241, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005).

5. The errors in dismissing and recalling the alternate juror failed to guarantee Pierce a fair trial by an impartial jury and to a unanimous verdict and can be reviewed for the first time on appeal.

Three errors arose at the commencement of jury deliberations that prejudiced Pierce's rights to an impartial jury and a unanimous verdict. First, the court failed to advise the alternates, when it excused them, that they could be recalled and needed to continue to abide by all the court's prior instructions, including not researching the law or facts. An alternate was in fact recalled and sat on Pierce's jury. Next, when the court sat the alternate, the initial 12-person jury had spent about two hours together, but the court did not instruct the reconstituted jury to begin deliberations anew. Finally, both alternate jurors appear to have been in the jury room with the jury during these couple hours, compromising the privacy and confidentiality of the 12-person jury.

Contrary to the State's contentions and as set forth in Pierce's opening brief, these errors of constitutional magnitude can be addressed for the first time on appeal. *State v. Ashcraft*, 71 Wn. App. 444, 464, 466, 859 P.2d 60 (1993) (constitutional rights violated if maintenance of juror impartiality is not clear from the record; reversible error of constitutional magnitude not to advise reconstituted jury to commence deliberations anew); *State v. Cuzick*, 11 Wn. App. 539, 543, 524 P.2d 457 (1974) (right

to juror privacy and confidentiality is not waived by defendant's silence); Op. Br. at 65-73.

6. The cumulative effect of the trial errors denied Pierce a constitutionally fair trial and requires remand for a new trial.

As set forth in the opening brief, even if not individually, the aggregate effect of these trial court errors denied Pierce a fundamentally fair trial. Op. Br. at 73-75.

7. The State agrees that the two prior nonviolent juvenile felonies count as only one half of one point each in the offender score.

The State agrees that, as Pierce argued in his opening brief, the juvenile prior offenses could only count as one half of one point when added into Pierce's offender score. *Compare* Op. Br. 75-76 *with* Resp. Br. at 68.

C. CONCLUSION

For the reasons set forth in Mr. Pierce's opening brief, supplemental assignments of error and brief in support, and in this reply brief, the matter should be remanded for a new trial. Alternatively, Mr. Pierce should be resentenced.

DATED this 26th day of July, 2017.

Respectfully submitted,

s/ Marla L. Zink

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 74363-5-I
v.	)	
	)	
KARL PIERCE,	)	
	)	
Appellant.	)	

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